

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

OCT - 1 2009

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
PENDLETON C. WAUGH, CHARLES M.) EB Docket No. 07-147
AUSTIN, and JAY R. BISHOP)
)
PREFERRED COMMUNICATIONS) File No. EB-06-IH-2112
SYSTEMS, INC.) NAL/Acct. No. 200732080025
)
Licensee of Various Site-by-Site Licenses in) FRN No. 0003769049
the Specialized Mobile Radio Service.)
)
PREFERRED ACQUISITIONS, INC.) FRN No. 0003786183
)
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Service)

To: The Commission

APPEAL

Michael D. Judy, on behalf of himself and the undersigned Appellants (collectively "Appellants") and pursuant to section 1.301(a)(1) of the Commission's rules,¹ hereby appeals the *Order* released by Chief Administrative Law Judge Sippel (the "Presiding Judge" or "Judge") in the above-captioned proceeding on September 25, 2009.² The *Order* renews the *August 6 Order*,³ which approved a Settlement Agreement by and between the Enforcement Bureau, Preferred Communication Systems, Inc. (the "Company"), Preferred Acquisitions, Inc. ("PAI"),

¹ 47 C.F.R. § 1.301(a)(1).

² *Pendleton C. Waugh, et al.*, EB Docket No. 07-147, *Order*, FCC 09M-57 (ALJ rel. Sept. 25, 2009) (the "*Order*").

³ *Order*, FCC 09M-51 (filed Aug. 6, 2009) ("*August 6 Order*").

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Charles M. Austin, and Jay R. Bishop.⁴ The *Order* also “reterminates” the instant hearing proceeding and rules Appellants’ Motion for Limited Intervention and Renewed Motion for Limited Intervention to be moot.⁵ The *Order* cannot stand; the Commission should reverse the *Order* and grant Appellants party status in this hearing proceeding.

Appellants have repeatedly sought the right to participate as parties in this proceeding in order to bring to raise the serious conflict-of-interest and other legal questions related to Mr. Austin’s purported representation of the Company.⁶ Appellants’ concerns have now been validated by the Delaware Chancery Court. On September 29, 2009, the Court granted Mr. Judy summary judgment with regard to his actions against the Company and Mr. Austin. The Court ordered the Company to produce books and records to Mr. Judy and to convene a stockholders’ meeting on December 9, 2009.⁷ The Court also appointed a Master to conduct the stockholders’ meeting, removing Mr. Austin as the Company’s sole director until such meeting is held and a minimum of four directors are elected.⁸

There is no longer any doubt that Appellants have a strong, direct interest in this matter that is not being adequately represented by Mr. Austin on behalf of the Company. Each individual appellant is a shareholder in the Company and each strongly believes that the terms of the Settlement Agreement released on August 6, 2009, is adverse to the interests of the Company. For instance, under the Settlement Agreement, the Company agrees to cancel the 57

⁴ *Order* at 4 (“*Order* FCC 09M-51 granting Joint Motion and Joint Request, accepting and approving Settlement Agreement, and Terminating Case IS HEREBY RENEWED with full force and effect.”).

⁵ *Id.* at 5 (“IT IS FINALLY ORDERED that all pending motions and conference requests remain moot, and this proceeding IS HEREBY RETERMINATED.”).

⁶ See Motion for Limited Intervention, EB Docket No. 07-147, at 2-3 (filed Aug. 16, 2009).

⁷ A copy of the Order Granting Plaintiff’s Consolidated Motion for Summary Judgment and the Judicial Action Form are appended hereto.

⁸ *Id.*

site-based 800 MHz licenses set forth in Schedule C of the Settlement Agreement. The Commission has ruled that non-Enhanced Specialized Mobile Radio (“ESMR”) Economic Area (“EA”) licensees who are relocated to the ESMR portion of the 800 MHz band will receive coverage comparable to the unencumbered area (or “white area”) they covered when the *800 MHz R&O* was published in the Federal Register.⁹ Moreover, unlike the treatment afforded to Nextel Communications, Inc.’s and Southern Communications Services, Inc.’s EA licenses, the Commission involuntarily transferred PAI’s spectrum right purchased in Auction #34 for a total of \$31.67 million to automatically receive the protected service area of site-based licenses encumbering its EA licenses upon their expiration or revocation or termination.¹⁰ Instead, the Commission automatically transfers such site-based licenses to Sprint Nextel Corp. This transfer apparently occurs regardless of whether Nextel Communications, Inc. or another licensee originally held the site-based license(s) encumbering the Company’s EA license(s). As a result, when the Company agreed to return 57 of its site-based licenses in Puerto Rico and the U.S. Virgin Islands to the Commission, it effectively transferred their respective protected service areas to Sprint Nextel Corp. without receiving any compensation.¹¹ Cancelling the Schedule C licenses therefore would impair greatly the Company’s and PAI’s spectrum in this EA market and decrease its value considerably.

By denying Appellants the right to participate as a party in this proceeding (twice no less), the Judge has effectively prevented Appellants from taking steps in this hearing proceeding

⁹ *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 25120 at 25154-55 (2004) (“*800 MHz Supplemental Order*”). See *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969 (2004) as amended by *Errata*, 19 FCC Rcd 19651 (2004) and 19 FCC Rcd 2181 (2004) (“*800 MHz R&O*”).

¹⁰ See 47 C.F.R. § 90.683(b).

¹¹ See Sprint Nextel Corp.’s Status Report on 800 MHz Band Reconfiguration, WT Docket No. 02-55, at 7 and note 7 (filed Sept. 1, 2009).

to protect their interests and the interests of the Company. Moreover, the Presiding Judge's rulings could stand as a potential bar to Appellants' ability to seek relief from the Commission, under Section 1.302 of the Commission's rules, which appears to contemplate that only a party to this proceeding has standing to appeal the Settlement Agreement.¹²

Finally, Appellants' Motion for Limited Intervention and their Renewed Motion are not moot. Under Commission rule Section 1.302(b), the *Order's* retermination of this hearing proceeding is automatically stayed for a minimum of 30 days.¹³ Thus, Appellants' Motion for Limited Intervention and their Renewed Motion remain viable until such time as the automatic stay under section 1.302(b) is lifted.

The Commission should act expeditiously to remedy the Judge's error. The Commission should confirm that Appellant's Motion for Limited Intervention and Renewed Motion is not moot and grant Appellants' party status as requested in their motions.

Respectfully submitted,

By: Michael D. Judy
Michael D. Judy

5874 Nees Avenue
Clovis, CA 93611
(559) 246-3979

On behalf of himself and:

¹² 47 C.F.R. § 1.302(a) ("If the presiding officer's ruling terminates a hearing proceeding, any party to the proceeding, as a matter of right, may file an appeal from that ruling . . .").

¹³ 47 C.F.R. § 1.302(b).

Linda Allen
Kenneth E. Aull
Alison D. Aull
Carole Lynn Downs
Kenneth Fry
Lia R. Gutierrez
James Herrick
Jane Herrick
Jamison N. Herrick

Mary E. Herrick
John Herrick
Sharlene Herrick
Julie Herrick
Marilyn Huckins
Lee Jones
R. J. Leedy
Alan D. Pelton
Kathryn A. Pelton

Neil Alan Scott
Michael A. Scott
John G. Talcott III
Dorothea J. Talcott
John G. Talcott, Jr.
Richard Thayer
Mary Thayer
Paul P. Tucker
Lyle L. Wells

Date: October 1, 2009

CERTIFICATE OF SERVICE

I, Michael D. Judy, do hereby certify that on this 1st day of October, 2009, the foregoing

Appeal was served by first class mail, postage prepaid, on the following persons:

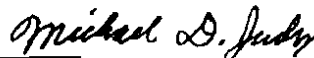
The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C768
Washington, DC 20554

Charles M. Austin
Preferred Acquisitions, Inc.
Preferred Communications Systems, Inc.
400 E. Royal Lane, 9 Suite N-24
Irving, TX 75039

Gary A. Oshinsky, Esq.
Anjali K. Singh, Esq.
Investigations and Hearing Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, DC 20554

William D. Silva, Esq.
Law Offices of William D. Silva
5355 Wisconsin Avenue, N.W.
Suite 400
Washington, DC 20015-2003
Attorney for Pendleton C. Waugh

Jay R. Bishop
P.O. Box 5598
Palm Springs, CA 92262



Michael D. Judy

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICHAEL D. JUDY)	C.A. No. 4662-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., a Delaware corporation,)	
)	
Defendant.)	
MICHAEL D. JUDY)	C.A. No. 4720-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., a Delaware corporation,)	
)	
Defendant.)	
MICHAEL D. JUDY)	C.A. No. 4721-CC
)	
Plaintiff,)	
)	
v.)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC., and CHARLES M. AUSTIN,)	
)	
Defendants.)	

**ORDER GRANTING PLAINTIFF'S
CONSOLIDATED MOTION FOR SUMMARY JUDGMENT**

WHEREAS Plaintiff Michael D. Judy ("Judy") commenced an action pursuant to 8 *Del. C.* § 220 to compel inspection of the books and records of Defendant Preferred Communication Systems, Inc. (the "Company"), C.A. No. 4662-CC;

WHEREAS Judy also commenced an action pursuant to 8 *Del. C.* § 211 to compel the Company to hold an annual meeting of the Company's stockholders for the election of directors, C.A. No. 4720-CC;

WHEREAS Judy also commenced an action against the Company and Defendant Charles M. Austin for declaratory relief, C.A. No. 4721-CC;

WHEREAS Judy has moved for summary judgment with respect to the §220 Action, the §211 Action, and his request for declaratory relief (the "Consolidated Motion for Summary Judgment"); and

WHEREAS the Court has considered such motion and briefing relating thereto, and has heard argument on the motion.

NOW, THEREFORE, IT IS HEREBY ORDERED, this 29th day of September, 2009:

1. Plaintiff's Consolidated Motion for Summary Judgment is granted.
2. **§ 220 Relief:** The Company shall produce the following books and records, dating from January 1, 2006, unless otherwise noted, for inspection and copying by Plaintiff and/or Plaintiff's representatives within ten (10) business days of the date hereof:
 - a. The Company's stock ledger and a list of the Company's stockholders, including any and all information reflecting (i) how many shares of stock are held by each stockholder (voting or non-voting), (ii) the particular series or class of stock held by each stockholder, and (iii) each stockholders' address and other contact information recorded by the Company;
 - b. The current Bylaws of the Company and Bylaws of Preferred Acquisitions, Inc. ("PAI");
 - c. All amendments to the Bylaws of the Company or Bylaws of PAI;
 - d. Any stockholder agreements, voting trusts, and/or similar agreements among stockholders and/or between the Company or PAI and any stockholders; and
 - e. Copies of all records of any and all options, warrants, or other securities or holdings that are exchangeable for voting stock in the Company, including an indication as to (i)

how many instruments are held by each holder, (ii) the conditions under which such instruments may be convertible to voting stock and at what rate, and (iii) each instrument holder's address and other contact information recorded by the Company.

3. The Company shall produce the following books and records, dating from January 1, 2006, unless otherwise noted, for inspection and copying by Plaintiff and/or Plaintiff's representatives within twenty (20) business days of the date of this Order:

a. All corporate minute books of each of the Company and PAI, including minute books relating to the boards of directors of the Company and PAI, or any committee thereof, as well as minute books relating to stockholder meetings of each of the Company and PAI;

b. All contracts between each of the Company and PAI and their respective officers and directors, including, but not limited to, employment contracts and compensation agreements;

c. All contracts or agreements between each of the Company and PAI and any and all consultants;

d. All records reflecting any statement or submissions made by the Company or PAI to the FCC;

e. Any agreement or other document that reflects, contains the terms of, or summarizes (a) compensation, benefits, or any other remuneration provided by each of the Company and PAI to any officer, director, agent, or consultant of the Company or PAI, (b) any loans made by the Company or PAI to any officer or director of the Company or PAI, and/or (c) any investments by the Company or PAI in any outside business ventures in which any director or officer of the Company or PAI is engaged;

f. All quarterly, annual, and any other financial statements or reports of the Company and/or PAI, whether audited or not; and

g. All business plans and/or financial projections of the Company and/or PAI, including any amendments thereto.

4. **§ 211 Relief:** The Company shall notice and shall hold an annual meeting of stockholders in accordance with the following (the "Annual Meeting"), notwithstanding any provision(s) of the certificate of incorporation or bylaws of the Company to the contrary:

a. The Annual Meeting shall be held on or about December 9, 2009 at 11:00 a.m. EST;

b. Plaintiff shall cause to be mailed the Notice of Annual Meeting of Stockholders ("Notice"), a form of which is attached hereto as Exhibit A, and distribute a proxy in the form attached hereto as Exhibit B, to all known stockholders not less than thirty (30) days prior to the date of the Annual Meeting;

c. The purpose of the Annual Meeting will be for the election of four (4) directors to the Company's board of directors, of which three (3) directors are to be elected by the holders of Common Stock of the Company ("Common Stock Directors") and one (1) is to be elected by the holders of the Series A 6% Cumulative Convertible Preferred Stock of the Company ("Series A Preferred Director");

d. The Annual Meeting shall not be adjourned, continued, or postponed prior to the election of directors absent further order of the Court;

e. The record date for purposes of determining the stockholders entitled to vote at the Annual Meeting shall be the date of this Order;

f. William Lafferty, Esquire is hereby appointed to serve as the Master of the Annual Meeting of stockholders of the Company and is empowered and directed to (i) collect

executed proxies from the stockholders of the Company, (ii) chair and oversee the Annual Meeting of stockholders of the Company for the election of directors and any other business that may properly come before the Company at the Annual Meeting and (iii) act as inspector of elections to determine the votes received for the election of directors and any other matters voted on at the Annual Meeting;

g. The shares represented at such Annual Meeting, either in person or by proxy, and entitled to vote thereof, shall constitute a quorum for the purpose of such Annual Meeting, with the Series A and Series B Common Stock of the Company constituting the quorum for purposes of the election of the Common Stock Directors ("Common Stock Quorum") and the Series A Preferred Stock constituting the quorum for purposes of the election of the Series A Preferred Director ("Series A Preferred Stock Quorum");

h. In connection with the election of the Common Stock Directors, the holders of the Series A Common Stock of the Company shall receive ten (10) votes per share, while the holders of the Series B Common Stock of the Company shall receive one (1) vote per share. In connection with the election of the Series A Preferred Director, the holders of the Series A Preferred Stock of the Company shall receive one (1) vote per share, and the holders of the Series B Preferred Stock of the Company shall not have any voting rights; and

i. The affirmative vote of a plurality of the Common Stock Quorum shall be the act of the Common Stockholders and result in the election of the Common Stock Directors. The affirmative vote of the majority of the Series A Preferred Stock Quorum shall be the act of the Series A Preferred Stock and result in the election of the Series A Preferred Director.

5. Until a board of directors is properly elected in accordance with the foregoing provisions for the meeting of stockholders, Austin shall not hold himself out as constituting the board of directors of the Company.

William B. Chandler III

Chancellor



COURT OF CHANCERY JUDICIAL ACTION FORM

Date: 9/29/09

CA: 4662-CC - Conow/4720-CC
4721-CC

- ☒ CHANCELLOR WILLIAM B. CHANDLER ☐ VICE CHANCELLOR J. TRAVIS LASTER
☐ VICE CHANCELLOR LEO E. STRINE, JR. ☐ MASTER SAM GLASSCOCK III
☐ VICE CHANCELLOR JOHN W. NOBLE ☐ MASTER KIM AYVAZIAN
☐ VICE CHANCELLOR DONALD F. PARSONS, JR.

PLAINTIFF: Michael D. Judy
DEFENDANT: Preferred Communication Systems, Inc

NATURE OF PROCEEDING

TEMPORARY RESTRAINING ORDER ☐ TRIAL ☐
MOTION TO DISMISS ☐ PRELIMINARY INJ. ☐
OTHER Hearing via telephone -

DECISION BY COURT: ☐ RESERVED: ☐

^{Inspection}
220 Request of Books & Records - granted - terms of order
211 - Stock Holder Meeting to be held 12/9/09 Place:
Leaves DE ^{location} of Registered Agent. William Lafferty Esq from
Morris, Nichols, Asht & Tunnel Asst as Master.
BRIEFING SCHEDULE Ruling on the Record

OPENING DUE: ☐ ANSWERING DUE: ☐

REPLY DUE: ☐

CLERK: Asimmons

STARTING TIME ☐ ENDING TIME ☐

2:30

3:30

William B. Chandler
CHANCELLOR

Plaintiff (s) Attorney:

✓ Peter Walsh, Jr Esq

Defendant (s) Attorney:

Charles Austin; and Mr. Suskey was informed a
DE Attorney needed to represent a Corporation.
Chancellor allowed Mr. Suskey to respond to Mr. Walsh.

Court Reporters

William Dawson ☐

Maureen McCaffery ☐

Diane McGrellis ☐

Neith Ecker ☐

Jennie Washington ☒